STATE OF MICHIGAN

COURT OF APPEALS

CHRISTMAN COMPANY,

Plaintiff-Appellant,

v

RENAISSANCE PRECAST INDUSTRIES, L.L.C.,

Defendant-Third Party Plaintiff-Appellee,

and

OHIO CASUALTY INSURANCE COMPANY, a/k/a WEST AMERICAN INSURANCE COMPANY, and SCOTTSDALE INSURANCE COMPANY,

Defendants-Appellees,

and

SIRKO ASSOCIATES, INC., STRAND CONSTRUCTORS, INC., and URS CORPORATION,

Third Party Defendants.

UNPUBLISHED
June 21, 2011

No. 296316
Emmet Circuit Court
LC No. 09-001744-CK

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Plaintiff Christman Company (Christman) appeals by leave granted from an order granting summary disposition to defendant Scottsdale Insurance Company (Scottsdale) pursuant to MCR 2.116(C)(10), and from an order granting summary disposition to defendant Ohio Casualty Insurance Company, also referred to as West American Insurance Company (West American), pursuant to MCR 2.116(C)(10). We affirm.

Christman entered into a construction contract with Northern Michigan Hospital Emergency and Heart Center (the Hospital) to build a parking deck. It subcontracted part of the work to Renaissance Precast Industries, L.L.C. Renaissance was insured by Scottsdale. Christman was an additional insured on this policy. Renaissance in turn entered into a contract with Sirko Associates, Inc. to design precast concrete, and with Strand Constructors, Inc. to erect the precast parking deck. Strand was insured by West American. Christman was identified as an additional insured on the certificate of liability insurance.

The Hospital notified Christman that there was a concrete failure at the parking structure. Repairs were undertaken, and Christman looked to Scottsdale and West American for payment and, when they declined, commenced this lawsuit. Scottsdale and West American moved for summary disposition. The trial court granted summary disposition based on the "voluntary payment" and "no action" clauses. We affirm the summary disposition on the alternative ground the insurance companies presented to the trial court, i.e., that there was no "occurrence." See *Adell Broadcasting Corp v Apex Media Sales*, 269 Mich App 6, 12; 708 NW2d 778 (2005) (This Court may affirm a summary disposition on alternative grounds, if those grounds were presented to the trial court). We decline to address the other issues raised in the parties' briefs.

Preliminarily, Christman argues that Scottsdale did not support its motion for summary disposition with affidavits, depositions, admissions or other admissible evidence.[1] MCR 2.116(G)(3)(b). We disagree. Scottsdale attached a picture of the damage, a copy of the invoice with supporting receipts, and the insurance policy. While there are no affidavits establishing that these documents are authentic, plaintiff did not challenge the authenticity of the policy below and has not done so on appeal. Because its authenticity is not in dispute, the documentation attached to Scottsdale's motion was sufficient to allow the court to rule on the motion for summary disposition.

We review de novo a trial court's ruling on a motion for summary disposition and the interpretation of language in an insurance contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). In ruling on a (C)(10) summary disposition motion, we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007).

Scottsdale's policy provides coverage for "bodily injury" or "property damage" caused by an "occurrence." "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same harmful conditions." "Property damage" is defined in pertinent part as "[p]hysical injury to tangible property, including all resulting loss of use of that

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[1] Christman also challenges the grant of summary disposition to West American on grounds that there was a genuine issue of material fact regarding consent. Because consent is not necessary to a determination that there was no "occurrence," we need not address this issue.

property." West American's policy language, in essence, is identical. The policies do not define "accident."

In *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 35; 772 NW2d 801 (2009), the Court held:

> An insurance policy is construed in accordance with Michigan's well-established principles of contract construction. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007). The policy must be enforced according to its terms, and a court may not hold an insurer liable for a risk it did not assume. *Id.* A court may not create an ambiguity in a policy if the terms are clear and unambiguous, and the failure to define a relevant term does not render the policy ambiguous. *Id.* at 82-83. Rather, reviewing courts must interpret the terms of the policy in accordance with their commonly used meanings. *Id*. at 83.

In *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369; 460 NW2d 329 (1990), Vector had to remove and repour 13,000 yards of concrete because the initial concrete failed to comply with project specifications. *Id.* at 371-372. In holding that there was no coverage, the Court interpreted contract language that was essentially identical to the contract language at issue here. *Id.* at 373. Initially, the Court recited the definition of "accident" that was set forth in *Frankenmuth Mut Ins Co v Kompus*, 135 Mich App 667, 678; 354 NW2d 303 (1984):

> "'An "accident," within the meaning of policies of accident insurance, may be anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected by the person injured or affected thereby—that is, takes place without the insured's foresight or expectation and without design or intentional causation on his part. In other words, an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected.'" *Guerdon Indus, Inc v Fidelity & Cas Co of New York*, 371 Mich 12, 18-19; 123 NW2d 143 (1963), quoting 10 Couch on Insurance (2d ed), § 41:6, p 27. [*Hawkeye Ins*, 185 Mich App at 374.]

Christman relies on this definition in arguing that the failure of the portion of the parking structure was an accident because it was unanticipated, unforeseen and unexpected. However, the Court in *Hawkeye Ins* held that Vector's defective workmanship—use of the inferior concrete—did not constitute an accident/occurrence within the meaning of the contract. The Court distinguished *Bundy Tubing Co v Royal Indemnity Co*, 298 F2d 151 (CA 6, 1962), which it concluded stood for the proposition that "an insurer must defend and may become obligated to indemnify an insured under a general liability policy of insurance that covers losses caused by 'accidents' where the insured's faulty work product damages the property of others," i.e., customers' homes. *Hawkeye Ins*, 185 Mich App at 377. This Court then adopted the reasoning of *McAllister v Peerless Ins Co*, 124 NH 676, 680; 474 A2d 1033 (1984), in which the court stated:

> *The fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship*. . . . Despite proper deference, then, to the reasonable expectations of the policyholder, . . . we are unable to find in the quoted policy language a reasonable basis to expect coverage for defective workmanship. [Emphasis added.]

Hawkeye Ins noted that *McAllister* "went on to hold that a general grant of coverage contained in a general coverage provision does not give rise to coverage for the cost of correcting defective work." *Id.* at 378, citing 124 NH at 680-681. The Court concluded that "the defective workmanship of Vector, standing alone, was not the result of an occurrence within the meaning of the insurance contract." *Id*.[2]

In *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134; 610 NW2d 272 (2000), the Court elaborated on this concept. It concluded, as in *Bundy*, that where the underlying complaint alleges "damages broader than mere diminution in value of the insured's product caused by alleged defective workmanship," there is a duty to defend and indemnify. *Id.* at 140-141. In *Radenbaugh*, the insured's instructions to contractors resulted in defective workmanship relative to the foundation of a basement. This resulted in damage to the basement and the customer's home. The Court adopted the reasoning of *Calvert Ins Co v Herbert Roofing & Insulation Co*, 807 F Supp 435 (ED Mich, 1992), to hold that the underlying complaint alleged an occurrence. *Id*. at 144-148. Because the damage at issue did not relate *solely* to the insured's product, there was coverage for this damage.

In *Liparoto*, 284 Mich App at 28, the general contractor used brick that discolored. The Court concluded that the discoloration was not an "occurrence" under the policy. *Id.* at 39. The policy definition of "occurrence" was, in essence, the same as that in *Hawkeye Ins* and the same used in the two policies at issue here—"'an accident, including continuous or repeated exposure to substantially the same general harmful conditions.'" *Id.* at 35. The Court held, "Here plaintiff did not allege, and presented no evidence, that there was damage beyond its own work product. Accordingly, the trial court did not err by concluding that plaintiff failed to establish an occurrence within the meaning of the policy." *Id*. at 38-39.

In the present case, the damage at issue was damage to the components of the parking structure itself. There were no damages beyond this work product. According to *Hawkeye Ins* and *Liparato*, property damage that is confined to the insured's work product will not be deemed an occurrence or an accident. Summary disposition was appropriate in this case, because the damage to the parking structure was not an "occurrence" within the meaning of the insurance policies.

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[2] Case law from other jurisdictions may undermine the *Hawkeye Ins* rationale. See *Sheehan Const Co, Inc v Continental Cas Co*, 935 NE2d 160, 165-172 (Ind, 2010), and cases cited therein, mod on other grounds 938 NE2d 685, 688-690 (Ind, 2010).

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Patrick M. Meter